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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. MISC.

GEORGE A. SIMMS,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

THOMAS J. FAGAN

JAMES W. FAGAN

FAGAN & FAGAN
V.F.W. Building
142 North Center Street
Casper, Wyoming 82601
Telephone: 307-234-9377

April 20, 1972

Counsel for Petitioner

APPENDIX "P"

INDEX

Index i

Table of Cases ii

Table of Constitutional Provisions and Statutes iii

Table of Authorities iii

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 5

- Introduction—Citations to Record 5
- Pertinent Facts 5
- Challenge to the Array 6
- Wife's Testimony 8

Reasons for Granting the Writ 8

- Challenge to the Array 9
- Wife's Testimony 17

Conclusion 20

Appendix A 22

Appendix B 43

Appendix C 46

TABLE OF CASES

Castle -vs- Texas
339 US 282, 94 L ed 839, 70 S Ct 629 14

Cole -vs- State
243 SW 1100 (Tex, 1922) 19

Dunn -vs- State
212 SW 511 (Tex) 20

Fay -vs- New York
322 US 261 (1947) 16

Glasser -vs- United States
315 US 86, 86 L ed 707 (1941) 14

Lankford -vs- State
222 SW 567 (Tex) 20

Lofton (WM.A.E.) -vs- State of Wyoming
October, 1971, term,
United States Supreme Court 9

Miller -vs- State
37 Tex Cr R 575, 40 SW 313 (Tex) 19

Rabinowitz -vs- United States
366 F2 34 (5th Cir, 1966) 15

Turner -vs- Fouche
90 S Ct 532 (1970) 13

TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C., § 1257 (3) 2

United States Constitution, Amendment V 3

United States Constitution, Amendment VI 3

United States Constitution, Amendment XIV, § 1 3

Wyoming Statutes, 1957
Section 1-142 ..... 5, 18

Wyoming Statutes, 1957
Section 18-105 ..... 4, 11

Wyoming Statutes, 1957
Section 18-107 4

TABLE OF AUTHORITIES

31 AM JUR 102, § 116 13,14

LBJ, 52 Vir. L. Rev. 1069 (April, 1966) 16

3 Wharton's Crim. Evid. 109, § 771 18

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TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, George A. Simms, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Wyoming rendered January 5, 1972, affirming a judgment rendered by the District Court, Seventh Judicial District, Natrona County, Wyoming, convicting the petitioner of murder in the second degree and sentencing him to 25 to 40 years imprisonment in the Wyoming State Penitentiary.

OPINION BELOW

The opinion of the Supreme Court of Wyoming affirming petitioner's conviction is unofficially reported at 492 P. 2d 516 and a copy of the same is annexed hereto as Appendix A. The opinion of the Supreme Court of Wyoming denying the petitioner's Petition for Rehearing is not at this time reported, however, a copy of the Wyoming Supreme Court's opinion denying petitioner's Petition for Rehearing is annexed hereto as Appendix C. There is no official reporter for the State of Wyoming.

JURISDICTION

The judgment of the Supreme Court of Wyoming affirming the petitioner's conviction of murder in the second degree was entered on January 5, 1972. A timely Petition for Rehearing (hereto annexed as Appendix B) was denied by the Wyoming Supreme Court on February 3, 1972, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1) Was the trial court's failure to discharge the jury panel challenged by the petitioner on the grounds that the panel did not contain a fair portion of Negro jurors based upon the proportion of Negro population in the County and did not contain a fair cross-section of the economic classes of the County a violation of the petitioner's rights under the provisions of the Sixth and Fourteenth Amendments to the Constitution of the United States?

2) Was the trial court's ruling, over petitioner's objection, that if the petitioner invoked his right to not have his wife testify against him, the State would be allowed to introduce a transcript of her testimony taken at the preliminary hearing when she was not his wife a

violation of the petitioner's rights under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wyoming Statutes, 1957, Vol. 6, P. 72, §18-105: Assessors to ascertain jury qualification of taxpayers. It shall be the duty of the county assessor of each county in this state, and his deputies, at the time of making the annual assessment in each year, to ascertain from each person assessed, either for a property or poll tax, and from all other private persons within his county whom he believes possess the qualifications of jurors as required by law, whenever such person can be found in his county, all information as to each of said persons, necessary to determine whether or not such person or persons is or are qualified persons to serve as jurors within the county; and for that purpose is hereby, authorized and required to administer to all such male persons, all such oaths or affirmations as may be necessary to elicit such information.

Wyoming Statutes, 1957, Vol. 6, P. 15, 1971 Cum.Sup., §18-107: List of qualified trial jurors; assessors to compile; contents; delivery and certification to clerk of district court. It shall be the duty of such assessors and their deputies from such information obtained upon assessment to make a list of all persons who shall appear therefrom to have the qualifications to serve as trial jurors. The list shall show the name and residence of each person qualified to serve as a trial juror, shall be made in triplicate, duly certified by such assessors, and two copies thereof shall be delivered to the clerk of the district court of said county by such assessors on or before the second Monday of January of each year, and one copy shall be delivered by such assessor to the county clerk of said county to be filed by said county clerk as a permanent record. The lists so certified to the clerk of the district court may be in such form that the names may be separated into suitable ballots for use by said clerk as provided by law.

Wyoming Statutes, 1957, Vol. 2, P. 133, Cum. Sup., § 1-142: Husband and wife as witnesses in civil and criminal cases. In no case shall the husband or wife be a witness against the other, except in criminal proceedings for a crime committed by one against the other, or in a civil action or proceeding by one against the other, or an action brought by the husband for criminal conversation with or seduction of his wife, or in an action brought by either husband or wife for the alienation of the other's affections; but they may in all civil and criminal cases be witnesses for each other the same as though the marital relation did not exist.

STATEMENT OF THE CASE

Introduction—Citations to Record

The record, submitted herewith, is compiled in six volumes; Volume I through Volume V numbered consecutively "1" through "1376," and Volume VII numbered "1394" through "1405." All pertinent instruments and orders from the Wyoming Supreme Court are contained in petitioner's Petition for Writ of Certiorari as Appendices "A," "B," and "C." Petitioner's Petition for Writ of Certiorari shall make all references to the record by inserting, within parentheses, along with such references, the page numbers supplied by the Clerk of the trial court. All these numbers being "stamped" upon each page. The "typed" page numbers are of no significance for the purpose of the identification of quotations from the record. In the interest of accurate quotations and clarity, petitioner, George A. Simms, has, and will be, sometimes referred to as "defendant."

Pertinent Facts

The facts of this case insofar as they are pertinent to this Petition for Writ of Certiorari are as follows:

The Petitioner, George A. Simms, was charged with

the February 11, 1969, premeditated murder of one Capp James Bird, was tried by jury, found guilty of second degree murder and appealed the case to the Wyoming Supreme Court which Court, on January, 5, 1972, affirmed the petitioner's conviction and denied his Petition for Rehearing on January 3, 1972. The petitioner admitted that he killed the deceased but maintained he was acting in self-defense.

The questions presented, as hereinbefore set out, make it necessary that only a detailed summary of the proceedings in reference to the petitioner's Challenge to the Array and his wife's testimony be herein set out in some detail and these facts concerning these two questions, as summarized by the Wyoming Supreme Court in its opinion, are:

Challenge to the Array

> Shortly before the trial, defendant filed a challenge to the array, charging that: the list of jurors selected was taken primarily from that part of the county tax assessment rolls containing only the names of persons owning real property with virtually none selected from that part of the county rolls containing the names of persons owning personal property; the ownership of real property in the county by negroes was negligible; a major portion of the few negroes appearing on the rolls as real property owners was not included in the list from which juries were empaneled; this resulted in the entire negro population of the county being arbitrarily excluded from jury service although that race comprised approximately 5 per cent of the county's total population; and defendant had a right to be tried before a jury of his peers. As support for this motion, he presented affidavits of (1) one Devereaux, a black electrical engineer and housing chairman for the Wyoming-Colorado Conference of the NAACP, as to affiant's estimate of the population of the county, and (2)

defendant's counsel to the effect that the ownership of real property by negroes was negligible, that typical of the failure to include negro owners of real property who appear on the assessment rolls but do not appear on the list of trial jurors were four persons, whom he named; that he had made personal investigation and inquired into procedure of compiling the list from which jurors were chosen to serve in the county, which study disclosed that the lists from which the jury panels were chosen came primarily from lists containing the names of persons owning real property with virtually none containing those who owned personal property only, that for a period of approximately thirteen years there had been a total of approximately three negroes selected to serve on jury panels in the county, that there were none on the existing panel, that none of the official district court personnel who would be involved in the trial of the defendant were negroes, and that the list of trial jurors from which the existing and previous jury panels were chosen did not include any persons within the county who did not show on the tax assessment rolls as the owners of property, real or personal, resulting in the entire class of nonproperty owners being excluded from jury service within the county.

The State countered this with affidavits from the assessor and clerk, the former stating that in accordance with his duties he obtains information as to qualifications for jury service from individual county assessment schedules and makes and certifies lists of trial jurors from the information obtained to the county clerk, who in turn deposed that she receives these lists and deposits each name thereon in the official jury box. Concerning the procedure of drawing juror names, the bailiff testified the names are placed in a bin or container that is rotated to mix them and the clerk draws them by lot until the desired number of jurors is obtained. Questioned about the number of negroes on the juries during the past the bailiff said that in the thirteen years he had served he remembered three or possibly four negroes who had been on the jury. (492 P. 2 516, Appendix A)

Wife's Testimony

When the State announced that it would call Norma Jean Simms as a witness, a colloquy occurred in chambers in which it was explained to the court that she had testified at the preliminary hearing at a time when she was not married to the defendant but that she was at the time of the trial his wife. Defense counsel asked the court what its position would be if she refused to testify (meaning apparently if defendant objected to her testimony) and the court responded, "She can't be called without his consent. . ." Defense counsel continued, ". . .what I want to know is if she refuses to testify will the transcript of her testimony then be admitted into evidence?" The court responded, ". . .it would be my ruling if the defendant invokes his right, that the State might offer the transcript." After some further colloquy defense counsel stated, "Let the record show that being forced to elect between having the transcript of the defendant's wife at the preliminary hearing introduced against us or. . .have the defendant waive his right to not have his wife testify against him and in view of the Court's ruling the defendant will waive his right to not have his wife testify against him." Following this conference (taken outside the hearing of the jury), the witness testified (before the jury) on behalf of the State, and the court at the request of the prosecutor and over the objection of defendant permitted interrogation of her as a hostile witness and reference during the questioning to the transcript of testimony from the preliminary hearing (where she had appeared voluntarily and been represented by counsel who had cross-examined) and to the statement she had given the night of the homicide. (492 P. 2 520, Appendix A)

REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari involves decisions in conflict with decisions of other courts of appeal on the

same matter; decisions in conflict with applicable decisions of this Court; issues which have not been, but should be, passed upon by this Court; and, decisions by a lower court that have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Challenge to the Array

The petitioner respectfully submits the State of Wyoming has, arbitrarily, since the beginning of its history, for all practical purposes, excluded Negroes from serving on juries and this is particularly true in Natrona County, Wyoming—these facts alone should be sufficient reason why this high Court should grant the petitioner's Petition for Writ of Certiorari. Petitioner also respectfully points out this identical issue is, at this time, before this Court, October, 1971, term, in another case from Natrona County, Wyoming, i.e., Petition for Writ of Certiorari in re: *William A. E. Lofton, Petitioner, against the State of Wyoming, Respondent.*

The petitioner's June 11, 1970, timely Challenge to the Array claimed: (144-146)

1) The impaneling of the jury was contrary to law in that the list of trial jurors was selected, primarily, from that part of the tax assessment rolls of Natrona County, Wyoming, containing only the names of those persons owning real property; and, that virtually none of those names on the list of trial jurors were selected from that part of the tax assessment rolls of Natrona County, Wyoming, containing the names of those persons who own personal property only.

2) That the ownership of real property by Negroes in Natrona County, Wyoming, is negligible; and, that virtually all of the Negro population in Natrona County, Wyoming, occupy their residences on a tenant basis and the ownership of real property

by Negroes, with some minor exceptions, is all but non-existent in Natrona County, Wyoming.

3) That a major portion of those very few Negroes appearing on the tax assessment rolls of Natrona County, Wyoming, as real property owners are not included in that list from which juries in Natrona County, Wyoming, are impaneled.

4) That the impaneling of the jury contrary to law in view of the limited ownership of real property by Negroes in Natrona County, Wyoming, as aforesaid, has resulted in the entire Negro population of the County of Natrona, State of Wyoming, being arbitrarily excluded from jury service, all of which is prejudicial to and discriminates against the defendant in that the defendant, a Negro, is being forced to stand trial on a capital offense before a jury selected from a panel containing no members of the defendant's Negro race, which Negro race comprises approximately 5 per cent of the total population of Natrona County, Wyoming.

5) That to force defendant to be tried by a jury selected from the existing panel is a violation of the defendant's rights under the Constitutions of the State of Wyoming and of the United States of America.

6) That defendant has a right to be tried before a jury of his peers, which right will be denied defendant if defendant is forced to stand trial before a jury selected from the panel as it now exists.

The Wyoming Statutes governing the compilation and selection of jury panels is hereinbefore set out under the heading of "Constitutional Provisions and Statutes Involved."

The record shows, uncontradictorily, that for many years immediately preceding the trial of the petitioner, it has been the practice of the county assessor of Natrona

County, Wyoming, to compile his list of qualified trial jurors from that part of the tax assessment rolls of Natrona County, Wyoming, which contained only the names of those persons owning real property (149 & 150).

Certainly, if only real property owners are selected for jury duty, there is no real representation of a cross section of the community and the lower economic class is denied a trial by a jury of his peers. Petitioner respectfully points out the Wyoming Statutes, 1957, §18-105, hereinbefore quoted, provides the assessor must provide a list which includes "all other private persons within his county whom he believes possess the qualifications of jurors as required by law," and in this regard, there has been a total non-compliance with the law as the jury panel challenged by the petitioner, and previous jury panels, included *no* persons within the County of Natrona, State of Wyoming, who did not show on the tax assessment rolls as the owner of property, real or personal, which resulted in an entire class, non-property owners, being excluded from jury service for the trial of this and previous cases (152).

The record makes it clear the petitioner, in his Challenge to the Array, established conclusively and without contradiction, that:

a) The jury panel consisting of 150 persons was chosen from only those people in Natrona County, Wyoming, who were assessed as the owners of real property (150).

b) That the ownership of real estate by Negroes in the County of Natrona, State of Wyoming, is negligible (149).

c) That a major portion of those few Negroes appearing on the tax assessment rolls of Natrona County, Wyoming, as real property owners are not included in that list of jurors from which jury panels in Natrona County, Wyoming, are impaneled (150).

d) The defendant is a Negro (1403).

e) That the original panel of 150 people contained no members of the Negro race (1403).

f) That during the past 13 years there has been, at most, a total of four persons of the Negro race included in the list of qualified trial jurors from which juries are chosen to serve in Natrona County, Wyoming (1400 & 1401).

g) That the population of Natrona County, Wyoming, at the time of the trial was approximately 51,039, and the population for the City of Casper, Natrona County, Wyoming, the site of the trial, was approximately 39,145 (147 & 148).

h) That the Negro population of Natrona County, Wyoming, at the time of the trial was in excess of 2,500 (148).

The State, in opposition to the defendant's Challenge to the Array, filed the Affidavit of Earl Osborn, the county assessor in and for the County of Natrona, State of Wyoming, stating, generally, his duties and that he "obtains the information for qualifications for jury service from individual assessment schedules for Natrona County, Wyoming, and makes such list of trial jurors from the information obtained, certifies same and delivers two copies thereof to the Clerk of the District Court of said county for use as trial jurors." His Affidavit further states that he has no "method available to determine race, creed or color of said trial jurors and the list of trial jurors is made without such knowledge." (154) Also in opposition to the defendant's Challenge to the Array was the Affidavit of Charlotte Bartshe, the Natrona County, Wyoming, Clerk of the District Court, which Affidavit states, generally, the procedure followed by the District Court Clerk after the office receives the certified lists of

qualified trial jurors prepared by the County Assessor (155).

The petitioner's position in standing trial before an all-white jury was further complicated by the fact that he was charged with killing a white man.

It is petitioner's position the showing made in support of and upon the hearing of his Challenge to the Array established a *prima facie* case of discrimination, i.e., exclusion of Negroes from Natrona County, Wyoming, jury panels, and at that point the burden of proof shifted to the State to overcome the *prima facie* case of discrimination established by the defendant's Challenge to the Array and hearing thereupon. This rule of law is, we believe, well set out in 31 AJ 102, §116, wherein it is stated:

> **Burden of Proof and Presumptions.** The *burden of proof* of an alleged class or racial discrimination in the selection of persons for jury service *is on him who asserts such discrimination.* However, proof of the absence of discrimination may be required of the state by the evidence presented by the movant. *Thus, when a prima facie case of racial discrimination in selecting a jury panel is presented in a criminal case the burden falls upon the state to overcome it. There is authority for the proposition that evidence that no members of the defendant's class or race have been drawn for jury service for several years makes out a prima facie case, or creates an inference, of discrimination against such class or race by the officers in charge of the selection of jurors.* (emphasis supplied)

In the very recent case of *Turner-vs-Fouche*, 90 S Ct 532 (1970), the Court held:

> The appellant demonstrated a substantial disparity between the percentage of Negro residents in the county as a whole and Negroes on the new(ly) constructed jury lists. They further demonstrated that

the disparity, at least in part, at the one point in the selection process where jury commissioners invoked their subjective judgment rather than objective criteria. The appellant thereby made out a *prima facie* case of jury discrimination and the burden fell on the appellees to overcome it.

The test, according to the *Turner* case, is to determine from the examination of the records the percentage of Negroes included in the panels over the past several years and also determine the percentage of eligible Negroes in the county. If there is a substantial disparity between these percentages, a *prima facie* case of jury discrimination is made out and the burden to prove otherwise is then shifted to the State. Here, in this case, the figures are grossly out of proportion; the percentage of the Negro population in Natrona County, Wyoming, being much higher than the percentage of Negroes appearing on the list of qualified jurors for Natrona County, Wyoming, the petitioner made out a *prima facie* case of discrimination.

In reference to the Negro meeting the statutory requirements for jury service, the rule is well set out in 31 AJ 103, §116 wherein it is said:

> The Supreme Court of the United States will assume that a large proportion of the Negro population of a county meets the statutory requirements for jury service. *Castle-vs-Texas*, 339 US 282, 94 L ed 839, 70S Ct 629

It is no defense to a charge of discrimination that the discrimination was not intentional or that the statute inadvertently discriminates against a particular class.

This Court, in *Glasser -vs- United States*, 315 US 86, 86 L ed 707 (1941), in commenting on the concept that a jury must be a "body truly representative of the community" said:

> . . .our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the official charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.

At least two "classes" were barred from jury service under the procedure followed in this case, i.e., non-real estate owners and, indirectly, the Negroes. The uncontradicted figures established in this case as to the population, Negro and otherwise, in Natrona County, Wyoming, leave no doubt the Negro, innocently or otherwise, has, for all practical purposes, been excluded from jury service in Wyoming. In other words, the system, as it was employed in the defendant's case simply did not result in a fair cross-section of the community being placed on the jury panel; on the contrary, again, the Negro population, as well as non-real estate owners, were excluded from the panel from which the jury was chosen to try the defendant. In *Rabinowitz -vs- United States*, 366 F2 34, 57 (5th Cir, 1966), the Court said at page 58:

> If a fair cross-section is consistently lacking, then, without more, it is established that the commissioners have failed in their duty.

In support of the basic proposition that not only Negroes, but those who are not owners of real estate, should be included on jury panels, are the following authorities:

> (T)here is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people. *Fay -vs- New York, 322 US 261, 299-300 (1947)*

> Denying jury service to any group deprives it of one of the oldest and most precious privileges and duties of free men. It is not the excluded group which suffers. Courts are denied the justice that flows from impartial juries selected from a cross section of the community. The people's confidence in justice is eroded. Quote from L. B. J., 52 Vir L. Rev. 1069 (Apr, 1966)

The system for selecting trial jurors in Wyoming is one of many years, but the time has come, now, to correct a situation that discriminates against the non-free holders as well as the Negro race. The trial judge, The Honorable T. C. Daniels, indicated to some extent at least, he was in agreement with defendant's counsel when he commented, in ruling on the defendant's Challenge to the Array, that "I believe we are coming to a time, just like the federal courts, we are going to have to look at other ways of selecting jurors. . ." (1402 & 1403).

We respectfully submit the time has come to correct this antiquated and discriminatory system for the selection of lists of qualified jurors in Wyoming.

Wife's Testimony

The specific question concerning the testimony of the petitioner's wife, hereinbefore set out under the heading "Questions Presented" is one this Court has not passed upon, and this reason alone should be sufficient to have this Court grant the Petitioner's Petition for Writ of Certiorari.

The homicide occurred on February 11, 1969 (15) with a preliminary hearing thereon being held on February 18, 1969 (7). The defendant's trial was held between the dates of June 15, 1970, through June 28, 1970. These dates are of great importance as one Norma Jean Simms testified for the State at the defendant's preliminary hearing when she was *not* his wife and also for the State at the defendant's trial when she *was* his wife. It is the circumstances surrounding the testimony of the defendant's wife at the trial which petitioner contends constituted error on the part of the trial court which could very well have convicted the defendant.

It is the petitioner's position that under no circumstances should his wife, over his objection, have been allowed to testify against him at the trial and, more important, that this rule of law should have prohibited the introduction of the transcript of her testimony taken at the preliminary hearing when she was not his wife. Prior to allowing the State to call the defendant's wife as a witness, the Court, out of the hearing of the jury, ruled that unless the defendant waived his right to not have his wife testify against him, then a transcript of her testimony taken at the preliminary hearing, when she was not his wife, would be introduced against him at the trial. During the hearing, out of the presence of the jury, petitioner's counsel strongly urged that neither the testimony of the defendant's wife nor the transcript of her testimony taken at the preliminary hearing should be used against him at the trial. Counsel made it clear to the Court he would

"waive" the petitioner's right to not have his wife testify against him *only* if he was "forced" to do so by the trial court's ruling that the transcript of her testimony at the preliminary hearing would be introduced against defendant if counsel refused to let defendant's wife testify at the trial (601-605). It was under these circumstances the petitioner's counsel "waived" the defendant's right to not have his wife testify against him, as a state's witness, at defendant's trial. The comments of counsel and the Court on this point are in the record (601-605).

There is no question—it is conceded—that in a criminal case a wife cannot be compelled to testify against her husband. This principle of law is covered by Section 1-142, Wyoming Statutes, 1957, hereinbefore set out under the heading of "Constitutional Provisions and Statutes Involved."

The critical question in this case is not only whether a wife can be forced to testify against her husband during the trial of a criminal case but whether or not she may be forced to *indirectly* testify against him by having a transcript of her testimony taken at the preliminary hearing, when she was not his wife, introduced against him at the trial when she was his wife. This issue, we believe, is one of "first impression" for this Court, however, other courts have ruled on it. Authority precisely in point is 3 Wharton's Criminal Evidence 109, Section 771, which states:

> **Marriage to suppress spouse's testimony.** The fact that the marriage was entered into after the commission of the crime or that it was contracted solely for the purpose of making a potential witness incompetent does not affect the applicability of the rule. *Thus, when the wife testified against the accused at the preliminary trial before her marriage to him, neither that fact nor the nature of her testimony may be shown at the trial, as the effect would be to make her indirectly a witness against him,* even though the

subsequent marriage was contracted for the purpose of making her incompetent as a witness. (emphasis supplied)

A Texas case, *Cole -vs- State*, 243 SW 1100 (1922), ruled on this precise point, i.e., Could the State introduce, or make any reference to, any testimony or transcript of testimony by a defendant's wife taken at a pre-trial proceedings at a time when she was not married to defendant? The Texas Court held such pre-trial testimony could not be introduced against the defendant, and any reference to such testimony constituted reversible error and the error was not corrected by the trial Court's admonishing the jury to disregard any reference to such testimony, the Texas Court, in making its ruling, said at page 1103:

> . . .Being his wife at the time of trial, she could not be called to testify to those facts, although he may have married her for the express purpose of closing her mouth. This court practically so announced in *Miller -vs- State*, 37 Tex Cr R 575, 40 SW 313. She being his wife, and the facts not showing her presence at the time of the homicide, could the state show, either directly or indirectly, that she had prior to the marriage testified to facts against him? We cannot escape the conclusion from the record before us that this was the effect of what occurred. The district attorney testified that on two former occasions (the examining and habeas corpus trials) she had been used by the State as a witness against him, and that he, the district attorney, had her testimony. The trial judge explains that he sustained objection to that part of the statement that she was 'used against appellant.' We are inclined to view that, even if this was done, the hurt was not remedied. . .

The Texas Court held that to use or make any reference to a wife's testimony against a defendant given at a time when she was not married to him was to "in-

directly" make the wife a witness against her husband and in this regard the Court said:

> In this we believe the State went further than the law permits. The effect of it was to indirectly make her a witness against her husband. (p. 1103)

The Texas Court, in support of its ruling, quoted two Texas cases, *Lankford -vs- State*, 222 SW 567 and *Dunn - vs- State*, 212 SW 511.

We believe two basic principles apply: 1) Norma Jean Simms, the petitioner's wife at the time of the trial, could not be compelled to testify against him as a State's witness; and, 2) The transcript of the testimony of Norma Jean Simms taken as a state's witness at the defendant's preliminary hearing, at a time when she was not his wife, should not have been introduced against him at the trial. The effect of the Court's ruling was to force petitioner's counsel to have the transcript of the testimony of Norma Jean Simms taken at the preliminary hearing introduced against him *or* to allow his wife to testify against him at the trial. Petitioner's counsel was forced to accept what he hoped to be the lesser of two evils and "waive" the petitioner's right to not have his wife testify against him. Trial counsel, at the time of being forced to make this critical election, recognized his only recourse to be the appellant courts and made every effort to protect the record, and hopefully, the court will consider the circumstances and rule on the basic and fundamental issues here involved.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Wyoming.

Respectfully submitted,

THOMAS J. FAGAN

JAMES W. FAGAN

FAGAN & FAGAN
V.F.W. Building
142 North Center
Casper, Wyoming 82601
Telephone: 307-234-9377

Counsel for Petitioner

April 20, 1972

APPENDIX "A"

George A. SIMMS, Appellant
(Defendant below),

v.

STATE of Wyoming, Appellee
(Plaintiff below).

No. 3917.

Supreme Court of Wyoming.

Jan. 5, 1972

Defendant was convicted in the District Court, Natrona County, T. C. Daniels, J., of second-degree murder, and he appealed. The Supreme Court, Parker, J., held that where defense counsel, notwithstanding contention that defendant was forced to elect to either have defendant's wife testify or allow state to offer transcript of wife's preliminary hearing testimony given at time she and defendant were not married, clearly and positively waived defendant's right to not have his wife testify against him by allowing wife to testify as witness, there was no "forced" election, and permitting prosecutor's use of wife's preliminary hearing testimony in interrogating her as hostile witness at trial was not error.

Affirmed.

McEwan, J., concurred specially and filed opinion.

1. Jury (Key)120

Defendant who challenged array without any specific information as to numbers of persons eligible for jury service or evidence of systematic and intentional exclusion but solely on approximations, opinions and recollections failed to establish prima facie case of exclusion of Negroes from jury service.

2. Witnesses (Key)76(3)

Where defense counsel, notwithstanding contention that defendant was forced to elect to either have defendant's wife testify or allow State to offer transcript of wife's preliminary hearing testimony given at time she and defendant were not married, clearly and positively waived defendant's right to not have his wife testify against him by allowing wife to testify as witness, there was no "forced" election, and permitting prosecutor's use of wife's preliminary hearing testimony in interrogating her as hostile witness at trial was not error. W.S.1957, § 1-142.

3. Criminal Law (Key)1172(2)

Instruction, in prosecution for murder to which there was no witness, that person may be presumed to intend consequences of his intentional acts worked no prejudice to defendant notwithstanding eyewitness testified as to attending circumstances immediately preceding the homicide.

4. Criminal Law (Key)789(4)

In homicide prosecution, instruction relating to reasonable doubt and stating that absolute certainty was not required was not improper.

5. Criminal Law (Key)786(2)

In homicide prosecution, informing jury, after instructing that testimony of the accused cannot be arbitrarily rejected, that jury had right to take into consideration defendant's manner of testifying, reasonableness or unreasonableness of his account of transaction, and his interest in result of verdict did not unfairly comment upon defendant's position as witness or overemphasize various matters which jury could take into consideration in discrediting his testimony and did not amount to an improper qualification of first part of instruction.

6. Criminal Law (Key)844(1)

In making objection to instructions, defendant may not single out for emphasis certain portions of instructions to support his contention.

7. Criminal Law (Key)755½, 783(1)

In homicide prosecution, instruction that evidence of character and disposition of the deceased was not admitted as tending in any way to justify his slaying by the defendant but was only to be considered by jury in determining who might have been aggressor did not constitute unfair comment upon evidence or erroneously define purposes for which character and disposition of deceased might be considered.

8. Criminal Law (Key)829(1), 830

Where substance of five of defendant's eight requested instructions had been given by court in other instructions and remaining three requested instructions presented incorrect or inapplicable statements of the law, there was no impropriety in rejecting requested instructions.

9. Criminal Law (Key)703

Where evidence adduced in homicide prosecution disclosed various circumstances from which it could have reasonably been argued that robbery motive was present, prosecution did not, in its opening statement, improperly outline a robbery motive to defendant's prejudice.

10. Criminal Law (Key)730(1)

Where court instructed jury to disregard comment at time defendant objected to prosecutor's statement in closing argument that State had no right of appeal, defendant was not prejudiced.

11. Criminal Law (Key)1036(4)

Where dummy with arrows inserted in it to show path of bullets through deceased's body and direction from which they came was received solely for such purpose, and defense not only failed to object when dummy was first presented but stated it had no objection so long as jury understood that dummy was admitted only for demonstrative purposes, introduction of dummy was not prejudicial error.

12. Criminal Law (Key)627.8(6)

Where State at trial offered eyeglasses, portions of which were broken and which were allegedly found at scene of homicide in connection with which defendant had filed pretrial motion for delivery and inspection of any physical evidence in possession prosecution, but defendant, whose pretrial motion had not disclosed eyeglasses, did not ask for inspection of materials not previously disclosed and for a continuance but rather undertook to impermissibly bypass afforded redress and demand mistrial, admitting eyeglasses was not error. Rules of Criminal Procedure, rule 18(b, h); Fed. Rules Crim. Proc. rule 16(b), 18 U.S.C.A.

13. Criminal Law (Key)338(1), 475

In homicide prosecution, refusing to allow defendant's medical witness to testify as to direction that deceased was moving when struck by bullets and sequence in which bullets were fired and testimony in reference to marijuana found in bedroom deceased was occupying prior to his death did not constitute error.

14. Criminal Law (Key)413(1)

Where it was not shown that defendant's written but unsigned statement allegedly given by him to police department on night of homicide was not self-serving declaration of type never received in evidence unless it forms part of res gestae and is spontaneous expression of party making it under spur of moment in explanation of his motives, refusing to allow admission of, or reference to, statement during defendant's direct examination was not error.

15. Homicide (Key)254

Evidence that defendant was armed, that deceased was not, that witness who had seen deceased frequently testified, in contradiction to defendant's contention, he had never known deceased to carry a gun, that deceased was in sleeping attire at time of shooting, and that deceased had been shot in both wrists, which would have prevented him from holding a gun, was sufficient to sustain second-degree murder conviction. W.S.1957, §6-54.

Fagan & Fagan, and Thomas J. Fagan, Casper, for appellant.

Clarence A Brimmer, Atty. Gen., Frederic C. Reed

and Richard A. Stacy, Asst. Attys. Gen., Cheyenne, for appellee.

Before McINTYRE, C. J., and PARKER and McEWAN, JJ.

Mr. Justice PARKER delivered the opinion of the court.

Defendent, George A. Simms, charged under § 6-54, W.S.1957, with the February 11, 1969, premeditated murder of Capp James Bird, was tried by jury, found guilty of second degree murder, and has appealed. He charges some eleven errors were committed by the trial court's:

1. Failing to discharge the jury panel challenged by the defendant and to empanel one that contained "a fair portion of Negro jurors based upon the proportion of the Negro population in the County";

2. Ruling that if defendant invoked his right to not have his wife, Norma Jean Simms, testify against him the State would be allowed to introduce a transcript of her testimony taken at the preliminary hearing—when she was not his wife;

3. Improperly instructing the jury;

4. Refusing certain instructions offered by defendant;

5. Permitting misconduct of State's counsel;

6. Admitting a dummy with arrows purporting to show the path of bullets through deceased's body;

7. Admitting into evidence broken eyeglasses not previously delivered to defendant for inspection;

8. Allowing the prosecution during direct examination to use a statement given by Norma Jean Simms and the transcript of her preliminary hearing testimony;

9. Refusing to allow testimony in reference to marijuana found in the bedroom deceased was occupying prior to his death;

10. Not allowing defendant's medical witness to testify as to the direction the deceased was moving when struck by the bullets and the sequence in which the bullets were fired;

11. Not admitting into evidence a statement of defendant taken by the police department on the night of the homicide.

In addition to these specific criticisms, it is argued generally that the verdict was not sustained by sufficient evidence and was contrary to law. Defendant admitted that he killed decedent but testified at the trial, and his counsel now accordingly contends, that he was acting in self-defense.

Although the trial was extended and the evidence voluminous, the relevant facts are uncomplicated and largely undisputed:

About 5:30 p.m. on February 11, 1969, in response to a telephone call, a police officer went to 1016 North Elma Street, Casper, and observed defendant, a black man, in the driveway, holding a .38 caliber Smith and Wesson revolver in the air. The officer asked for and received the gun, removing five empty cases from it. Investigating officers went inside and found deceased, a

white man (clad in pajama tops, bath robe,[1] and slippers), lying on the bedroom floor, with ten bullet holes in his body. A loaded revolver belonging to Mrs. Simms was lying beside him. No fingerprints were on it. Testimony introduced at the trial showed that this gun had not been fired recently but that the one surrendered by defendant was the weapon which killed the deceased. The doctor conducting the autopsy testified there had been five bullets fired, one having made three holes in the body of deceased, one having made one, and the other three each having made two. Only one of the shots was fatal, severing the aorta, which would have dropped blood pressure to zero almost instantly. On the evening of the homicide defendant made a statement to the officers. At the time of the charged offense, the residence at 1016 North Elma Street was in the name of Norma Jean Simms, a black woman, to whom defendant had been married from 1960 to 1966 when they had been divorced. (They were remarried between the time of the preliminary hearing and the trial.) During their marriage the two had owned the residence jointly, and at the time of the offense charged owned certain business property in the city. Despite the divorce, they had continued to live together as husband and wife until January 1969. On February 10, 1969, defendant tried to telephone Mrs. Simms from Tacoma, Washington, but was unable to contact her. He called again from Spokane, leaving a message for her to the effect that he would try to be in Casper the next day about 5 p.m. After his arrival in Casper on the 11th at about 4 p.m. he spoke with Mrs. Simms over the phone—apparently regarding the sale of their Casper business property because of his financial situation—and was

1. Later when the body was to be put on a stretcher, the coroner felt a bulge in the robe pocket and a roll of bills ($2,514) was removed.

assured by Mrs. Simms that despite the fact Capp James Bird was there defendant might come to her home. He thereafter went to her residence, took out a .38 caliber Smith and Wesson revolver from his car (he indicated at the trial that this was done because he was fearful of deceased), knocked, was admitted, and went inside. There followed an altercation, the nature of which is somewhat disputed, and defendant fired several shots, which resulted in the death of decedent. No one except defendant and deceased saw what occurred immediately preceding the fatal shot as Mrs. Simms had run from the house before she heard shots fired.

Challenge to the Array

Shortly before the trial, defendant filed a challenge to the array, charging that: the list of jurors selected was taken primarily from that part of the county tax assessment rolls containing only the names of persons owning real property with virtually none selected from that part of the county rolls containing the names of persons owning personal property; the ownership of real property in the county by negroes was negligible; a major portion of the few negroes appearing on the rolls as real property owners was not included in the list from which juries were empaneled; this resulted in the entire negro population of the county being arbitrarily excluded from jury service although that race comprised approximately 5 per cent of the county's total population; and defendant had a right to be tried before a jury of his peers. As support for this motion he presented affidavits of (1) one Devereaux, a black electrical engineer and housing chairman for the Wyoming-Colorado Conference of the NAACP, as to affiant's estimate of the population of the county, and (2) defendant's counsel to the effect that the ownership of real property by negroes was negligible, that typical of the failure to include negro owners of real

property who appear on the assessment rolls but do not appear on the list of trial jurors were four persons, whom he named; that he had made personal investigation and inquired into procedure of compiling the list from which jurors were chosen to serve in the county, which study disclosed that the lists from which the jury panels were chosen came primarily from lists containing the names of persons owning real property with virtually none containing whose who owned personal property only, that for a period of approximately thirteen years there had been a total of approximately three negroes selected to serve on jury panels in the county, that there were none on the existing panel, that none of the official district court personnel who would be involved in the trial of the defendant were negroes, and that the list of trial jurors from which the existing and previous jury panels were chosen did not include any persons within the county who did not show on the tax assessment rolls as the owners of property, real or personal, resulting in the entire class of nonproperty owners being excluded from jury service within the county.

The State countered this with affidavits from the assessor and clerk, the former stating that in accordance with his duties he obtains information as to qualifications for jury service from individual county assessment schedules and makes and certifies lists of trial jurors from the information obtained to the county clerk, who in turn deposed that she receives these lists and deposits each name thereon in the official jury box. Concerning the procedure of drawing juror names, the bailiff testified the names are placed in a bin or container that is rotated to mix them and the clerk draws them by lot until the desired number of jurors is obtained. Questioned about the number of negroes on the juries during the past the bailiff said that in the thirteen years he had served he

remembered three or possibly four negroes who had been on the jury.

(1) Numerous cases are cited by counsel as supporting the view that the challenge to the array should have been allowed. We find no occasion to reverse the trial court, which stated informally, "I am not satisfied that the assessor and officers haven't followed in good faith the statutory requirements." We discussed the question of challenges to the array in the case of Lofton v. State, Wyo., 489 P.2d 1169, 1171-1172, where incidentally Lofton used certain of the affidavits and supporting information on which defendant here relies for reversal on this point. As we there explained, study of the cited cases upon analysis shows that wherever the challenge has been recognized it has stemmed from evidence of *systematic* and *intentional* exclusion of some group and not merely from the fact that there are numbers of a group in the community and a lack of their members on the jury array. More importantly, we noted in Lofton, 489 P.2d at 1172, as we do here, the unfortunate method by which the attack on the jury array was launched, i.e., without any specific information as to numbers or persons eligible for jury service and solely on approximations, opinions, and recollections. Conjecture can have no part in such challenges and specific evidence, here lacking, is essential to establish a prima facie case of exclusion.[2]

Mrs. Simms' Testimony

When the State announced that it would call Norma Jean Simms as a witness, a colloquy occurred in chambers

2. While various methods are available for such a challenge, perhaps the simplest is the presenting of a person (or persons) who has paid taxes and is not included in the assessment roll or in the list submitted by the county assessor to the clerk of the district court although possessing all legal qualifications of a juror.

in which it was explained to the court that she had testified at the preliminary hearing at a time when she was not married to the defendant but that she was at the time of the trial his wife. Defense counsel asked the court what its position would be if she refused to testify (meaning apparently if defendant objected to her testimony) and the court responded, "She can't be called without his consent * * * ." Defense counsel continued, " * * * what I want to know is if she refuses to testify will the transcript of her testimony then be admitted into evidence?" The court responded, " * * * it would be my ruling if the defendant invokes his right, that the State might offer the transcript." After some further colloquy defense counsel stated, "Let the record show that being forced to elect between having the transcript of the defendant's wife at the preliminary hearing introduced against us or * * * have the defendant waive his right to not have his wife testify against him and in view of the Court's ruling the defendant will waive his right to not have his wife testify against him." Following this conference (taken outside the hearing of the jury), the witness testified on behalf of the State, and the court at the request of the prosecutor and over the objection of defendant permitted interrogation of her as a hostile witness and reference during the questioning to the transcript of testimony from the preliminary hearing (where she had appeared voluntarily and been represented by counsel, who had cross-examined) and to the statement she had given the night of the homicide.

(2) It would appear that when Mrs. Simms was first called there were two questions in the minds of court and counsel: (1) Could the wife testify against the husband at the trial? (2) Could the transcript of her testimony at the preliminary hearing taken at a time when they were not married be introduced against him? Defense counsel's concluding statement in the conference with the court,

notwithstanding his speaking earlier of "being forced to elect," clearly and positively waived defendant's right to not have his wife testify against him. However, he now charges that the court erred in forcing him "to elect between waiving the defendant's right to not have his wife testify against him or have the transcript of her previous testimony" introduced and that the court compounded its error in allowing the State after calling Mrs. Simms as their own witness to treat her as a hostile witness and to use her statement and the transcript of her testimony in an attempt to discredit and impeach her testimony. Having chosen to have his wife testify as a witness, defendant is in no position to argue about his "forced" election, however, Professor Wigmore says that a disqualification of a witness by exercise of a privilege[3] makes the witness's present testimony unavailable and accordingly should allow resort to his former testimony, a doctrine which was not accepted by early English common law courts but was well established in chancery practice and would probably be generally followed in our courts. 5 Wigmore, Evidence, §1409, pp. 163 and 164 (3 ed.). Among numerous cases cited in substantiation of this statement are McCoy v. State, 221 Ala. 466, 129 So. 21; Wyatt v. State, 35 Ala.App. 147, 46 So.2d 837 (certiorari denied 254 Ala. 74, 46 So.2d 847); both of which cases deal with the admission of a wife's testimony taken at a former hearing when the privilege of not testifying was invoked at the trial. Other cases pertaining to this situation are State v. Stewart, 85 Kan. 104, 116 P. 489; State v. Woods, 130 Kan. 492, 287 P. 248; and the subject is treated in Annotation, 45 A.L.R.2d 1354. Such holdings are in line with the general rule which allows introduction of testimony given by a witness in a prior

3. This court has heretofore construed §1-142, W.S.1957 (1971 Cum.Supp.), as granting a privilege. Chamberlain v. State, Wyo., 348 P.2d 280.

proceeding through use of properly authenticated notes of a court stenographer when the witness is unavailable because of privilege. Johnson v. People, 152 Colo. 586, 384 P.2d 454, 457; Mason v. United States, 10 Cir., 408 F.2d 903, 905. The single case relied upon by defendant for a contrary view, Cole v. State, 92 Tex.Cr.R. 368, 243 S.W. 1100, is not in point since it is noted that there the matter before the court was whether or not it was error for the district attorney to have *testified* that statements of a woman, not present at the scene of the homicide, and at the time of the trial the wife of defendant, had previously been "used against" the defendant.

Under this state of the law, the trial court was justified in it ruling, and furthermore, neither cogent argument nor authority is presented to show there was error in permitting the prosecutor's use of Mrs. Simms' statement and the transcript of her testimony at the preliminary hearing in interrogating her.

Instructions Given

(3) Objection was interposed to six instructions, Nos. 10, 13, 17, 18, 19, and 23. Number 10 was the usual instruction given in a criminal case when there is no witness to the crime charged, to the effect that a person may be presumed to intend the consequences of his intentional acts. Defendant asserts that he was prejudiced since here an eyewitness testified as to attending circumstances immediately preceding the homicide. State v. Parmely, 65 Wyo. 215, 199 P.2d 112, 118, cited by him as authority, is not in point since in that opinion the court observed, "In the case at bar there were eyewitnesses present who testified as to what occurred *at the time* Messmer was injured." (Emphasis supplied.)

(4) Instruction 13[4] relating to reasonable doubt is challenged because of the holdings in certain unnamed cases in another jurisdiction. Since this court has in numerous and recent cases approved the instruction, we find no occasion to examine the matter except on detailed and explicit presentation of authority, which is not present here.

(5) Instruction 17 is questioned because the court after indicating that the testimony of accused cannot be arbitrarily rejected continued:

> "In weighing the testimony of the defendant in this case, you have the right to take into consideration his manner of testifying, the reasonableness or unreasonableness of his account of the transaction, and his interest in the result of the verdict, as affecting his credibility. You are not required to receive blindly the testimony of the accused as true, but you are to consider whether it is true, and made in good faith, or only for the purpose of avoiding conviction."

Defendant insists this language qualified the first part of the instruction, unfairly commented upon his position as a witness, and overemphasized the various matters which the jury may take into consideration in discrediting the witness.

This instruction is quite similar to that given in Haines v. Territory, 3 Wyo. 167, 13 P. 8, 15, and resembles one approved in Younger v. State, 12 Wyo. 24, 73 P. 551, 554, where the court said:

> " * * * We think the only substantial effect of the instruction is to inform the jury that they have the right in determining the credibility to be accorded to the testimony of the defendant to consider his interest in the result of the trial, in addition to noticing his

4. YOU ARE INSTRUCTED that to establish the guilt of a defendant beyond a reasonable doubt is not meant that such guilt shall be established to an absolute certainty. Absolute certainty in the establishment of any fact is rarely attainable, and never required in courts of justice.

manner, and taking into consideration the probability of his statements in connection with the other evidence in the cause. We do not think that the instruction is subject to the criticism that it unreasonably and improperly disparages the defendant's testimony." [5]

(6) Instructions 18 and 19, taken together, are criticized as improperly defining the law by suggesting to the jury that the defendant had the burden of proving he acted in self-defense. We have examined these instructions carefully and find nothing therein which said or even suggested that defendant had the burden of proving self-defense. Instead we note that defendant has singled out for emphasis certain portions of the instructions to support his contention, and that may not be done.

(7) Defendant says of Instruction 23 [6] that it unfairly commented upon the evidence and erroneously defined the purposes for which the character and disposition of the deceased might be considered. We perceive nothing in it which bears out the criticism, unsupported as it is by cogent argument or authority.

In summary, we have carefully examined the challenged instructions in light of the relevant law and as applied to the facts in the present appeal and hold that the court did not err in giving them.

5. To the same effect is Reagan v. United States, 157 U.S. 301, 309, 15 S.Ct. 610, 39 L.Ed. 709.

6. "The court instructs the jury that evidence has been introduced of the character and disposition of the deceased. This was not admitted as tending in any way to justify his slaying by the defendant. This evidence is to be considered by the jury only as a circumstance, illustrating the facts of the homicide and the surrounding circumstances, and to be considered by you in determining who might have been the aggressor and the nature of aggression; it being more probable that a person of quarrelsome and dangerous character would make an unprovoked assault rather than a quiet and peaceable person."

Instructions Not Given

(8) Defendant objected to the court's refusing to give eight of his requested instructions, B through I, inclusive. We have reviewed the record and note that as to five of these the substance had been given by the court in other instructions and that the remaining three presented incorrect or inapplicable statements of the law. Accordingly, we observe no impropriety in the court's rejection.

Misconduct of Counsel

(9) Defendant contends that the prosecution in its opening statement improperly outlined a robbery motive to his prejudice. Without repeating or elaborating on the factual situation to which we have referred, we have no hesitancy in saying that the evidence adduced disclosed various circumstances from which it could have reasonably been argued that such was a motive. Thus there was no error. Templar v. Tongate, 71 Wyo. 148, 255 P.2d 223, 226; Nicholson v. State, 18 Wyo. 298, 106 P. 929, 931.

(10) Defendant insists that prejudicial error was committed when in closing argument it was said that the State had no right of appeal. At that time objection was made to the statement and the court instructed the jury to disregard the comment. While the objection of defendant was well taken and such remark was not proper, there was no error when the court took immediate steps to remedy the Situation, State v. Sorenson, 34 Wyo. 90, 241 P. 705, 707; State v. Benjamin, Mo., 309 S.W.2d 602, 605; State v. Merryman, 79 Ariz. 73,283 P.2d 239, 241.

The Dummy

(11) It is submitted that the State's introduction of a dummy with arrows inserted in it "apparently to show

the path of the bullets through the deceased's body and, indirectly, at least, to show the direction from which they came" was prejudicial error, citing as authority for such position Paseo v. State, 19 Wyo. 344, 117 P. 862. This allegation is without merit. In the first place, the Paseo opinion was not dealing with an expert witness, who had performed an autopsy. More importantly, defendant here not only failed to object when the dummy was first presented but his counsel at that time stated, "We have no objection to it (the dummy) just so the Jury understands that is the only purpose (for demonstrative purposes), that is not purported to be the deceased." Subsequently the exhibit was received "solely for the purpose of the offer, namely, to demonstrate the direction and course of bullets."

Broken Eyeglasses

(12) During pretrial procedures defendant filed a motion for discovery and inspection, asking, among other things, that he be allowed to inspect "any physical evidence in connection with this case within the possession, custody, or control of the State." The court by order granted the motion with respect to Simms' written statement, the Autopsy report, results of scientific experiments concerning ballistics and fingerprints, two guns and marijuana or drugs found at the scene, photographs made by the State at the scene, and results of tests concerning projectiles fired at or into the deceased, but denied the balance of the motion. At the trial, the State offered a plastic container holding eyeglasses, portions of which were broken, purporting to be found at the scene of the homicide, whereupon defendant moved for a mistrial, which was denied. He now maintains that under Rule 18(b), W.R.Cr.P., he had a right to discover what physical evidence the State in fact had and that the ruling was prejudicial error. The discussion of Rule 16(b),

Fed.Rules Cr.Proc. (practically identical to our Rule 18(b)), by the court in United States v. Fioravanti, 3 Cir., 412 F.2d 407, 410-411, is in point, where, after recognizing that pretrial discovery in criminal cases is admittedly a complex and controversial question, it stated that application for relief under discovery rules is a matter within the sound discretion of the district court and its ruling would not be disturbed except for an abuse of discretion. Defendant here did not avail himself of the relief afforded under Rule 18(h), W.R.Cr.P., of asking for inspection of materials not previously disclosed and for the granting of a continuance but rather undertook to by-pass the afforded redress and demanded a mistrial. This is impermissible. Further, there is no proper showing that the introduction of the glasses was prejudicial. Accordingly, we hold there was no error in this aspect.

Rejection of Evidence

(13) At the trial, defendant sought to prove by Dr. John A. Manns, M. D. and professional criminalist, the order in which the bullets entered the body and a deduction of the direction the deceased was going at the time he fell. The court rejected these offers as it also did that of a quantity of marijuana found in the bedroom of Mrs. Simms' Elma Street residence. These rejections are argued to have been erroneous and prejudicial. However, no cogent argument or authorities are presented in substantiation, and we see no merit in the contentions.

Defendant's Statement

(14) Defendant complains that during his direct examination the court refused to allow admission of or reference to a written but unsigned statement given by him to the Casper Police Department on the night of the homicide, saying that this constituted error because the writing was relevant and should be as available for his use

"as it was, obviously, used by the State." However, he does not delineate the State's "use" nor present any legal authority to substantiate the claim of error. Moreover, no effort is made to show that the contention is not in direct contravention of the well recognized rule that self-serving declarations of a defendant in a criminal prosecution are never received in evidence unless they form a part of the res gestae and are the spontaneous expressions of the party making them under the spur of the moment in explanation of his motives. Reavis v. State, 6 Wyo. 240, 44 P. 62, 63.

Sufficiency of the Evidence

(15) It is argued at length that the verdict of murder in the second degree was not sustained by sufficient evidence. Defendant admits that he armed himself with a .38 caliber revolver before going on the premises where he knew Mr. Bird and Mrs. Simms were, and that he shot and killed the decedent. However, he points out that he went to the house on the invitation of Mrs. Simms, that he had a right to go there armed, and was not thereby deprived of the right of self-defense, that he shot the deceased in self-defense, his testimony to that effect not being impeached, and that his version was not improbable or inconsistent with the other facts and circumstances shown and should not have been arbitrarily rejected as it obviously was by the jury. In so contending, however, he should not overlook other matters which the jury was entitled to consider and resolve, and since there were certain conflicts in the evidence the jurors were in those areas the sole judges of the credibility of the witnesses. Among these factors was the circumstance that although defendant said he armed himself before he entered the house "Because I knew Junior Bird was in there, he packed pistols, and he indicated he would do something to me if I stood in the way of money," another witness who

had seen the deceased frequently had never known of his carrying a gun. A further inconsistency became appparent when no gun of the dead man was found by the officers at the scene of the homicide or at his apartment. The only three guns found were the fatal weapon owned by defendant, the one near the dead body and belonging to Mrs. Simms, but on which there were no fingerprints, and one underneath the floor mat of defendant's car. Other circumstances although not conflicting were entitled to consideration: the dishabille of deceased—dressed only in pajama top, robe, and slippers; the testimony of the pathologist who performed the post-mortem as to the direction of the bullets, stating that only one shot, which severed the aorta, was fatal and that another bullet had struck deceased in both wrists, which would have prevented him from holding a gun. Other facts and aspects disclosed by the evidence and within the province of the jury to weigh might, of course, be enumerated, but these mentioned are sufficient to disclose substantial evidence for sustaining the verdict.

Affirmed.

McEWAN, Justice (concurring).

I approve of all of the majority opinion with the exception of that portion under the heading "Mrs. Simms' Testimony," and with that portion I concur. The defendant did not make any contention nor did he point out where any of the testimony given by the wife was detrimental or prejudicial to him. I have examined the record and find nothing in the wife's testimony that appears to be detrimental to him. Her testimony is consistent with the defendant's theory of the case; that is, self defense.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF WYOMING

GEORGE A. SIMMS,	)	
	)	
Appellant,	)	Case No. 3917
(Defendant below)	)	
	)	
-vs-	)	
	)	In the Supreme Court, State of Wyoming, Filed, Jan. 31, 1972. Ann Oeland *Clerk*
STATE OF WYOMING,	)	
	)	
Appellee,	)	
(Plaintiff below).	)	

PETITION FOR REHEARING

Appellant, George A. Simms, defendant below, respectfully petitions the Court for a rehearing of this case and reconsideration of its January 5, 1972, decision affirming appellant's conviction on the charge of murder in the second degree; and, as grounds for this Petition, your petitioner respectfully alleges the Court has erred in its ruling on those points hereinafter set out:

1) That this Court has erred and should reconsider its decision in holding that the trial Court did not err in "failing to discharge the jury panel challenged by the defendant and to empanel one that contained 'a fair portion of Negro jurors based upon the proportion of the Negro population in the County' "; and,

2) That this Court has erred and should reconsider its decision in holding that the trial Court did not err in

"ruling that if defendant invoked his right to not have his wife, Norma Jean Simms, testify against him the State would be allowed to introduce a transcript of her testimony taken at the preliminary hearing—when she was not his wife."

In support of this Petition for Rehearing is appellant's Brief filed herewith.

WHEREFORE, appellant respectfully requests this Court grant appellant a rehearing in this case on those issues hereinbefore briefly set out and that upon the rehearing, as herein requested, this Court enter its Order setting aside the verdict of the jury and the sentence thereon and granting to appellant a new trial.

Respectfully submitted,

FAGAN & FAGAN
Attorneys for Appellant

/s/ Thos. J. Fagan
V.F.W. Building
142 North Center
Casper, Wyoming 82601

CERTIFICATE OF MAILING

I, Thos. J. Fagan, one of the attorneys for the appellant in the within appeal, do hereby certify that I served the within and foregoing PETITION FOR REHEARING upon the attorneys for the appellee by placing a copy thereof in the United States mails, postage prepaid, properly addressed to Clarence A. Brimmer, Attorney General, State of Wyoming, State Capitol Building, Cheyenne, Wyoming, 82001, a copy thereof addressed to John Burk, County and Prosecuting At-

torney, Natrona County, Wyoming, City-County Building, Casper, Wyoming, and a copy thereof addressed to G. J. Cardine (former Natrona County, Wyoming, County and Prosecuting Attorney), 410 Con Roy Building, Casper, Wyoming, on the 29th day of January, 1972.

/s/ Thos. J. Fagan

APPENDIX "C"

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1971
2/3/72

GEORGE A. SIMMS, Appellant (Defendant below), v. STATE OF WYOMING Appellee (Plaintiff below).	)	No. 3917 In the Supreme Court, State of Wyoming, Filed, Feb. 3, 1972. Ann Oeland *Clerk*

Appeal from the District Court of Natrona County, the Honorable T. C. Daniels, Judge.

ON PETITION FOR REHEARING

Thomas J. Fagan, Casper, in support of petition.

PER CURIAM.

Defendant, George A. Simms, having applied for rehearing, but failing to advance any matter not heretofore considered by this court, the same is denied.

Supreme Court, U. S.
FILED
JUL 5 1972
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. 71-1361 MISC.

GEORGE A. SIMMS,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

CLARENCE A. BRIMMER
ATTORNEY GENERAL
STATE OF WYOMING
204 Capitol Building
Cheyenne, Wyoming 82001
Telephone: (307) 777-7384

COUNSEL FOR RESPONDENT

FREDERIC C. REED
ASSISTANT ATTORNEY GENERAL
STATE OF WYOMING
204 Capitol Building
Cheyenne, Wyoming 82001
Telephone: (307) 777-7384

OF COUNSEL

June 3, 1972

INDEX

Index i
Table of Cases ii
Table of Statutes iv
Table of Authorities v
Statutes Involved 2-3
Statement of the Case 3
Reasons for Denying the Writ 4
The Challenge to the Array 4
Wife's Testimony 10
Conclusion 17

TABLE OF CASES

Barber v. Page
1968, 390 U.S. 719 11-12

California v. Green
1970, 399 U.S. 149 12

Cole v. State
243 SW 1100 (Texas 1922) 15

Fay v. New York
1947, 332 U.S. 261 9

Garner v. Louisiana
1961, 368 U.S. 157, 166 5

Hoyt v. Florida
1961, 368 U.S. 57 9

Johnson v. People
384 P.2d 454 (Colo. 1963) 15

Langham v. State
68 So. 504 (Ala. 1916) 14

Lofton v. State
489 P.2d 1169 (Wyo. 1971) 4

Lofton (Wm. A. E. v. State of Wyoming)
October 1971, Term,
United States Supreme Court 4

McCoy v. State
129 So. 21 (Ala. 1930) 13

Mason v. United States
408 F.2d 903 (10th Cir. 1969) 15

Peek v. United States
321 F.2d 934 (9th Cir. 1963) 10

TABLE OF CASES (con't)

Simms v. State
492 P.2d 516, 520 (Wyo. 1972) 6, 11, 15

State v. Bollen
10 Wyo. 439, 70 P. 1 (1902) 5

State v. Radon
45 Wyo. 383, 19 P.2d 177 (1932) 5

State v. Solomon
489 P.2d 643 (Wash. Ct. App. 1971) 15

State v. Stewart
116, P. 489, 493 (Kan. 1911) 13, 14

State v. Woods
278 P. 248 (Kan. 1938) 14

Swain v. Alabama
1965, 380 U.S. 202 7-8

Thiel v. Southern Pacific Co.
1946, 328 U.S. 217 10

Turner v. Fouche
1970, 396 U.S. 346 8-9

United States v. Allen
409 F.2d 611 (10th Cir. 1969) 15

United States v. Mobley
421 F.2d 345 (5th Cir. 1970) 15

Williams v. Oklahoma
1959, 358 U.S. 576, 583 5

TABLE OF STATUTES

Wyoming Statutes, 1957
Section 1-77 ..... 2, 4

Wyoming Statutes, 1957
Section 1-142 ..... 2, 10, 12

Wyoming Statutes, 1957
Section 39-87 ..... 2, 4

TABLE OF AUTHORITIES

45 A.L.R.2d 1354 15

McCormick on Evidence,
Section 234, pp. 495 12-13

5 Wigmore, Evidence,
Section 1409 pp. 163..... 15

1960 Census of Population, Volume 1,
Characteristics of the Population,
Part 52, Wyoming, United States
Department of Commerce, Bureau of
the Census, Table 25 7

1970 Census of Population, General
Population Characteristics,
Wyoming, United States Department
of Commerce, Bureau of the Census,
Table 34 6-7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. 71-1361 MISC.

GEORGE A. SIMMS,

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v.

THE STATE OF WYOMING,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

TO: THE HONORABLE, THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

The Respondent, State of Wyoming, respectfully prays that this Court deny the Petition for a Writ of Certiorari filed in the above-captioned case.

STATUTES INVOLVED

Wyoming Statutes, 1957, Vol. 1, p. 127, Cum. Sup., Section 1-77 Qualifications of juror. --A person is competent to act as a juror if he or she be:

1. A citizen of the United States, of the age of twenty-one (21) and not more than seventy-two (72) years, who shall have been a resident of the state one year and the county ninety (90) days before being selected and returned.

2. In possession of his or her natural faculties and of ordinary intelligence and not decrepit.

3. Possessed of sufficient knowledge of the English language.

4. Assesed on the last assessment roll of the county.

Wyoming Statutes, 1957, Vol. 2, p. 133, Cum. Sup., Section 1-142, Husband and wife as witnesses in civil and criminal cases. --In no case shall the husband or wife be a witness against the other, except in criminal proceedings for a crime committed by one against the other, or in a civil action or proceeding by one against the other, or an action brought by the husband for criminal conversation with or seduction of his wife, or in an action brought by either husband or wife for the alienation of the other's affections; but they may in all civil and criminal cases be witnesses for each other the same as though the marital relation did not exist.

Wyoming Statutes, 1957, Vol. 9, p. 218, Section 39-87, Assessment rolls and tax lists to be furnished assessors; includable items generally. --On the last day of January in each year, the board of county commissioners shall furnish each assessor with suitable assessment rolls and schedules properly ruled and headed, in which to enter the following items:

First --The name of the individual, corporation, company, society, partnership, or firm, to whom any property shall be taxable;

Second--His or their lands by township, range, section or part of a section and where such part is not a legal division or subdivision some other description sufficient to identify it, and his or their town lots or parts of lots, naming the town in which they are situated, and their proper description by number and block or otherwise, according to the system of numbering in the town;

Third--His or their personal property by the following particulars: Amount of capital employed in manufactures; number and value of horses; number and value of mules and asses; number and value of neat cattle; number and value of sheep and goats; number and value of swine; number and value of carriages and vehicles of every description; amount of all personal or other property not herein enumerated; other property not enumerated belonging to any corporation or company, whether incorporated in this state or not; amount of clocks, watches, jewelry, gold and silver plate; number and value of musical instruments; amount of taxable household furniture; amount of farming utensils and mechanics' tools, shares of stock in any bank, loan or investment company, incorporated under the laws of the United States of America or the State of Wyoming, doing business in this state; amount of all other property not enumerated; the number of polls; and a column for remarks.

STATEMENT OF THE CASE

The Respondent, State of Wyoming, accepts the Statement of the Case as set forth by the Wyoming Supreme Court which was adopted by Petitioner and appears on pages 5 through 8 of Petitioner's Brief.

REASONS FOR DENYING THE WRIT

Challenge to the Array

While this Court has not had occasion to review the method of jury selection used in Wyoming and by several other jurisdictions, the decision of the Wyoming Supreme Court is not in conflict with the latest decisions of this Court on this issue, and the identical issue was presented for this Court's determination in another case from Natrona County, Wyoming, October Term, 1971, in the Petition for Writ of Certiorari in re: *William A. E. Lofton, Petitioner, v. The State of Wyoming, Respondent, No. 71-6070,* which Petition was denied by this Court on May 22, 1972.

The Petitioner in the *Lofton* case, like the Petitioner herein, overlooks the provisions of Section 1-77, Wyoming Statutes, 1957 (1971 Cum. Supp.) set out in this Brief under the heading, STATUTES INVOLVED, which contains as one of the qualifications of a juror that he be "assessed on the last assessment roll of the county." This provision is controlling since it was the latest enactment of the Legislature of Wyoming. The two provisions quoted by Petitioner in his Brief, Sections 18-105 and 18-107, Wyoming Statutes, 1957, were originally enacted in 1888, while Section 1-77, *supra,* was enacted in 1890. "All of the statutes relating to jurors must be considered *in pari materia.*" *Lofton v. State,* 489 P.2d 1169 (Wyo. 1971).

Petitioner also overlooks the provisions of Section 39-87, Wyoming Statutes, 1957, which requires that the assessors list the owners of all *real and personal* property on the assessment rolls. The Trial Court below specifically found that the assessor and the clerk followed the statutory guidelines in compiling and selecting the jury (1403).

As pointed out on page 7 of Petitioner's Brief as support for his challenge to the jury array, Petitioner's counsel pre-

sented his own affidavits (149 and 152) to the effect that he had studied the procedure for compiling the lists from which jurors are chosen and discovered that only the names of persons owning real property appeared thereon, (150) and that the list of trial jurors from which the existing and previous jury panels were chosen did not include any persons within the county who do not appear on the tax assessment rolls as owners of property, real or personal (152).

The reason, of course, that no persons who do not own real or personal property do not appear on the jury panels in Wyoming is the provisions of the Wyoming Statutes quoted earlier under the heading, STATUTES INVOLVED, which provisions require that the assessors list the owners of all real and personal property on the assessment rolls, and that a person is competent to act as a juror only if he or she be assessed on the last assessment roll of the county, and for the further reason that the Wyoming Supreme Court has interpreted the statutes of the State of Wyoming (as it is entitled to do, *see, Williams v. Oklahoma,* 1959, 358 U.S. 576, 583; *Garner v. Louisiana,* 1961, 368 U.S. 157, 166) as requiring the jury commissioners to make a jury list from the assessment rolls, *State v. Bollen,* 10 Wyo. 439, 70P. 1 (1902); and *State v. Radon,* 45 Wyo. 383, 19 P.2d 177 (1932).

The real issue presented by the Petitioner is not the exclusion of non-real property owners from the jury, it is the absence of Negroes from the jury panel. But nowhere in the Record is it shown that Negroes or personal property owners in Natrona County are systematically excluded from juries. This must be shown in order to make out a *prima facie* case of discrimination. There was no proof that members of the Negro race do not appear on the tax rolls. As a matter of fact, when jury lists are drawn, it is not known what race or color the prospective juror is. This was substantiated by the affidavit of Earl Osborn, County Assessor, in his affidavit appearing on page 154 of the Record.

In addition, the authority cited by Petitioner that no member of Petitioner's race have been drawn for jury service for several years does not make out a *prima facie* case of discrimination. That argument in this case is inefficable since the testimony of the Petitioner's own witness was that three or four Negroes have served on juries in the last few years. (The Respondent does not concede that there have been only four Negroes drawn for jury duty over the last thirteen years, as the only evidence of this fact was the statement of the court bailiff who indicated that he *only remembered* three or four Negroes serving during the last thirteen years.)

As stated by the Wyoming Supreme Court in its opinion (*Simms v. State*, 492 P.2d 516, 520 (Wyo. 1972), also appearing as Appendix "A" of Petitioner's Brief at page 32),

> "... the unfortunate method by which the attack on the jury array was launched, i.e., without any specific information as to numbers or persons eligible for jury service and solely on approximations, opinions, and recollections. Conjecture can have no part in such challenges and specific evidence, here lacking, is essential to establish a prima facie case of exclusion."

As pointed out by Petitioner in his Brief on page 6, as support for his challenge to the jury array, he also presented an affidavit of "one Devereaux, a black electrical engineer and Housing Chairman for the Wyoming-Colorado Conference of the N.A.A.C.P., as to affiant's estimate of the population of the county, ..." which affidavit states that the Negro population of Natrona County, Wyoming, at the time of trial was in excess of 2500 persons (148). According to the 1970 Federal Census, however, there are only 410 Negroes in Natrona County, Wyoming. *1970 Census of Population, General Population Characteristics, Wyoming, U.S. Department of Commerce, Bureau of the Census, Table 34.* The 1960 census for the State of

Wyoming shows that in Natrona County there were 483 Negroes. *1960 Census of Population, Volume 1, Characteristics of the Population, Part 52, Wyoming, United States Department of Commerce, Bureau of the Census, Table 25.*

This shows a reduction in the percentage of Negroes in Natrona County, Wyoming, over the last ten years. The small number of Negroes in Natrona County and in the entire State make it quite possible that the selection of 150 names drawn from the jury lists would not include any member of the Negro race thereon. The evidence presented by the Petitioner does not make out a *prima facie* case of discrimination. In order to show such discrimination, actual figures must be used together with a showing of an artificially limited selection of jurors based upon a systematic and intentional exclusion of a particular group.

Additionally, it is not constitutionally required that a jury be a perfect mirror of the community, nor is a defendant in a criminal case constitutionally entitled to a proportionate number of his race on the jury. As this Court stated in *Swain v. Alabama*, 1965, 380 U. S. 202:

> "...a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him ...."

and

> "Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.... We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented...."

This Court went on to say at page 209 of the United States Reporter that:

> "There is no evidence that the commissioners applied different standards of qualifications to the Negro community than they did to the white community. Nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners. It is not clear from the record that the commissioners even knew how many Negroes were in their respective areas, or on the jury roll or on the venires drawn from the jury box. The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specified number of Negroes. Undoubtedly the selection of propective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case."

It is the position of the Respondent that the *Swain* case is directly applicable to the case at bar. The burden of proof was not carried by the Petitioner below as pointed out in the Wyoming Supreme Court's opinion quoted above.

The case of *Turner v. Fouche,* 1970, 396 U. S. 346, cited by Petitioner as authority for a *prima facie* case of discrimination in this case is distinguishable from the facts of the case at bar. In *Turner,* there was evidence that the population of the county was sixty percent Negro and that a very disproportionate number of Negroes had been selected for jury duty by

reason of their having been disqualified because they were "unintelligent" or not "upright citizens." In *Turner,* of the 178 persons disqualified for this reason, 171 were Negroes.

In the case at bar, however, the Petitioner has alleged that there are 2500 Negroes in Natrona County, which would be less than five percent of the population of the county. This, however, is in error since the Negro population of Natrona County, Wyoming, is 410, which is .008 percent of the county, and there was no evidence presented that any Negro was excluded from the jury list as unqualified. Nor was there any showing other than the self-serving affidavits of Petitioner's own counsel that only persons owning real property appeared on the jury lists. The Petitioner must make a showing of discrimination or prejudice in the manner in which the jury was selected. The mere fact that the venire does not represent a cross-section of the community is not sufficient nor is it accurate.

This Court in *Fay v. New York,* 1947, 332 U. S. 261, at 284, stated:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absense was caused by discrimination, ..."

This was also the Court's holding in *Hoyt v. Florida,* 1961, 368 U.S. 57, where this Court held:

> "In the administration of the jury laws proportional class representation is not a constitutionally required factor."

The Respondent submits that the Petitioner has not made a *prima facie* showing of discrimination. As noted by this Court

in *Thiel v. Southern Pacific Co.*, 1946, 328 U.S. 217, discrimination requires the additional showing of a "systematic and intentional exclusion" of a particular group.

The State of Wyoming has not "since the beginning of its history" excluded Negroes from serving on juries. No evidence of this allegation was presented at the hearing on the challenge to the jury array as the Wyoming Supreme Court pointed out, nor was there evidence that Negroes in Natrona County, Wyoming, do not own real property, or that Negroes do not appear on the tax assessment rolls of Natrona County, Wyoming.

The decision of the Wyoming Supreme Court below in no manner conflicts with the decisions of this Court, it was decided correctly, and this issue here presented should not be passed upon by this Court.

WIFE'S TESTIMONY

It is true that this Court has not had occasion to specifically review the question presented here as to the wife's testimony. This Court has, however, reviewed the traditional exception to the right of confrontation and has not seen fit to reverse that rule where the witness is unavailable at the time of trial. As to whether a wife is unavailable by reason of the claimed privilege not to allow one spouse to testify against the other, all courts other than the jurisdiction of Texas are in accord.

The statutory provision pertaining to this issue is set out before under the heading, STATUTES INVOLVED, and is Section 1-142, Wyoming Statutes, 1957. The right not to allow a spouse to testify against a defendant at trial is a privilege and one which may be waived. *Peek v. United States*, 321 F.2d 934 (9th Cir. 1963), *cert. den.* 376 U.S. 954.

In this case, the Petitioner waived the right not to allow his wife's testimony at the trial as found by the Wyoming Supreme

Court in its decision *Simms v. State,* 492 P.2d 519 (Wyo. 1972), at page 521 of the Pacific Reporter where the Court stated:

> "Defense counsel's concluding statement in the conference with the court, notwithstanding his speaking earlier of 'being forced to elect,' clearly and positively waived defendant's right not to have his wife testify against him . . . Having chosen to have his wife testify as a witness, defendant is in no position to argue about his 'forced' election, . . ."

The Petitioner could have claimed the privilege thus allowing the transcript of his wife's testimony taken at the preliminary hearing when she was not his wife to be read into evidence and then have claimed error on that ground. This, he did not do.

It is a simple matter that since the witness, Jean Simms, was not married to the Petitioner at the time of her testimony at the preliminary hearing (wherein she had appeared voluntarily and was represented by counsel who had cross-examined, as was the Petitioner) such testimony could be taken, and it could have been used at the trial in the event she was unable, refused, or was barred from testifying. She was not barred, nor unavailable since the Petitioner waived that disability as he had a right to do, and it was not necessary to use the transcript of testimony at the trial nor was it introduced against the Petitioner.

This Court as stated above has reviewed the exception to the right of confrontation. In the case of *Barber v. Page,* 1968, 390 U.S. 719, this Court said:

> "It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that

> defendant . . . This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement."

The case, however, was reversed for the reason that the witness was found to be not unavailable since he was incarcerated in a Federal prison and no attempt was made by the prosecution to obtain his presence for trial.

In *California v. Green,* 1970, 399 U.S. 149, this Court stated:

> "This court long ago held that admitting the prior testimony of an unavailable witness does not violate the confrontation clause.
>
> . . .
>
> "The right of cross-examination then afforded [at the preliminary hearing] provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State."

Had the Petitioner herein claimed the privilege granted him by Section 1-142 of the Wyoming Statute (Section 1-142, Wyoming Statutes, 1957), Jean Simms who was then his wife, would have been unavailable by the Petitioner's own actions. No violation of the due process clauses of the Fifth and Fourteenth Amendments is shown, nor is there a violation of Petitioner's rights under the Sixth Amendment.

McCormick on Evidence, Section 234, at page 495 states that:

"If the witness was competent at the time the former testimony was taken, but later becomes incompetent, as by . . . the privilege of one spouse not to testify against the other, the witness is properly regarded as unavailable."

Several State Supreme Courts have followed the rule and have declared the spouse to be unavailable where the claim of privilege has been invoked.

In *McCoy v. State,* 129 So. 21 (Ala. 1930), a case cited to the trial court, and one which is always cited for this particular rule, the wife of the Defendant was called as a witness at her husband's preliminary hearing and was not informed of the privilege not to testify. She voluntarily testified at that time, and later at the trial, she claimed the privilege and refused to testify. The Appellate Court noted that the husband and wife were bound by her testimony at the preliminary hearing where the opportunity of objection and cross-examination existed. The Court then held that it was not error to allow the magistrate to read into evidence the testimony of the wife taken at the preliminary hearing.

In the case of *State v. Stewart,* 116 P. 489, 493 (Kan. 1911), the witness had testified at the preliminary hearing and was present at the trial, but claimed the statutory privilege and declined to testify against his wife. The Court held that he had appeared voluntarily and testified at the preliminary examination in the presence of his wife, who was given full opportunity to cross-examine and that he was a competent witness. That his refusal to testify at the trial made the information which he had formerly given inaccessible to the plaintiff as if he had been dead or out of the jurisdiction. And, that if a witness cannot prevent the use of his testimony by stepping outside the jurisdiction of the Court, he cannot defeat the use of the testimony by claiming his statutory privilege.

Likewise in *Langham v. State*, 68 So. 504 (Ala. 1916), a case very similar to the case at bar, the witness voluntarily testified against the Defendant at the preliminary hearing, and then later married the Defendant and claimed the privilege. The Appellate Court pointed out the reason for the rule permitting secondary evidence of such testimony was that personal attendance of such a witness was unattainable through no fault or voluntary act of the party proposing the use of the former testimony, thus making it an act of injustice not to receive it. But, the Court held that the reason for the rule did not exist in this case since the incompetency of the witness was occasioned by the voluntary act of the Defendant in making her his wife.

Again, in *State v. Woods*, 278 P. 248 (Kan. 1938), the witness (prosecutrix) testified against the Defendant at the preliminary hearing for the crime of statutory rape. However, before trial, the Defendant married the prosecutrix. At that time, the applicable Kansas statute read:

> "No person on trial or examination, nor wife or husband of such person, shall be required to testify except as a witness on behalf of the person on trial or examination."

In an effort to exculpate the Defendant, the prosecutrix took the stand and waived the privilege. The Court held:

> "Moreover, in this case, it would have been of no consequence to the state if the prosecuting witness had claimed her privilege not to testify against defendant. Her testimony given at the preliminary examination was available, and could have been read to the jury. *State v. Stewart*, 85 Kan. 404, . . . 116 P. 489. *See also, State v. Taylor*, . . . 37 P. 1053; *State v. Bell*, . . . 250 P. 281."

Wigmore states the rule in the following manner:

> "A disqualification by a subsequently-acquired *interest*, or the exercise of a *privilege*, makes the witnesses present testimony unavailable, and hence should suffice to allow resort to his disposition or former testimony."

5 Wigmore, Evidence, Section 1409, pp. 163.

The subject is also treated in the Annotation appearing in 45 A.L.R.2d 1354.

These cases cited above are in line with the general rule which allows introduction of testimony given by a witness in a prior proceeding through use of properly authenticated notes of a court stenographer when the witness is unavailable because of privilege. *See, Mason v. United States*, 408 F.2d 903 (10th Cir. 1969), *cert. den.*, 400 U.S. 993 (1971); *United States v. Allen*, 409 F.2d 611 (10th Cir. 1969); *United States v. Mobley*, 421 F.2d 345 (5th Cir. 1970); *Johnson v. People*, 384 P.2d 454 (Colo. 1963); *State v. Solomon*, 487 P.2d 643 (Wash.Ct.App. 1971).

The one case relied upon by the Petitioner in his Brief, *Cole v. State*, 243 SW 1100 (Texas 1922) as found by the Wyoming Supreme Court, in its opinion at page 521:

> "... is not in point since it is noted that there the matter before the court was whether or not it was error for the district attorney to have *testified* that statements of a woman not, present at the scene of the homicide, and at the time of the trial the wife of defendant, had previously been 'used against' the defendant." *State v. Simms*, 492 P.2d 516 (Wyo. 1972).

The law on this issue appears to be well settled. The testimony given by a witness in a prior proceeding may be introduced in evidence when the witness is unavailable at the trial. This unavailability may be by reason of death, sickness, beyond the jurisdiction of the court, or privilege. And, the privilege of one spouse not to testify against the other makes the witnes unavailable. Research discloses that there is only one case in conflict and that is the case relied upon by the Petitioner. The decision of the Wyoming Supreme Court is in no way in conflict with the rules cited above. The Petitioner effectively waived his right not to have his wife testify against him at the trial, and the question is not of sufficient importance to require consideration by this Court.

CONCLUSION

Since the Petitioner has not made a *prima facie* showing of discrimination against members of the Negro race or against personal property owners in Natrona County, Wyoming, in the method of jury selection, and is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him, and waived his right not to have his wife testify against him, the Petitioner's writ does not warrant further consideration by this Court. If, however, this Court feels that the allegations set forth within the Petition are of a meritorious nature and deserving of further consideration, the Respondent respectfully requests that it be allowed to fully brief and argue such issues for this Court.

Respectfully submitted,

/s/ Clarence A. Brimmer
Attorney General
State of Wyoming
204 Capitol Building
Cheyenne, Wyoming 82001

COUNSEL FOR RESPONDENT

/s/ Frederic C. Reed
Assistant Attorney General
State of Wyoming
Cheyenne, Wyoming 82001

OF COUNSEL

CERTIFICATE OF MAILING

I, Clarence A. Brimmer, Attorney General for the State of Wyoming, do hereby certify that I served the within and foregoing BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI upon the attorneys for the Appellant by placing a copy thereof in the United States mails, postage prepaid, properly addressed to Mr. Thos. J. Fagan, Fagan and Fagan, V.F.W. Building, 142 North Center, Casper, Wyoming 82601, a copy thereof addressed to John Burk, County and Prosecuting Attorney, Natrona County, Wyoming, City-County Building, Casper, Wyoming, and a copy thereof addressed to G. J. Cardine (former Natrona County, Wyoming, County and Prosecuting Attorney), 410 Con Roy Building, Casper, Wyoming, on the 3rd day of June, 1972.

/s/ Clarence A. Brimmer